AN

ENQUIRY

INTO THE

LEGALITY

OF PUTTING

SOLDIERS TO DEATH, &c.

A

AN ENQUIRY INTO THE LEGALITY OF PUTTING SOLDIERS TO DEATH By SENTENCE of a COURT-MARTIAL, IN TIME OF PEACE.

Humbly ſubmitted to the
CONSIDERATION OF THE PUBLIC,
By the AUTHOR.

IS THE LAW SIN? GOD FORBID!
ROM. vii. 7.

Adſit regula peccatis quæ pœnas irroget æquas.
HOR.

Dedicated to
CHARLES LUCAS, M. D.

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TO

CHARLES LUCAS, M. D.

ONE OF THE

REPRESENTATIVES in PARLIAMENT
for this CITY,

THE FOLLOWING

ENQUIRY, &c.

Is moſt humbly DEDICATED,

By his moſt obedient Servant,

THE AUTHOR.

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TO tire the patience of the public with numberleſs excuſes for troubling them with new performances, may in ſome caſes ſeem requiſite as well as cuſtomary. But I flatter myſelf in this caſe it is almoſt needleſs, ſince it proceeds from the warmeſt ſenſations of humanity.

In undertaking the following Enquiry, I conſidered myſelf as diſcharging a part of my duty: as paying a debt due to my country, and to the whole race of mankind. I looked upon it as the buſineſs of every man, to contribute his mite towards the relief, aſſiſtance, and ſupport of his fellow creature; and though he fails of ſucceſs, he is not therefore to be cenſured, when his endeavours were not wanting to accompliſh the deſign.

Mankind ought never to forget, that, after the duty they owe to God, they owe the next to their country: that one man was made for the defence of another; and that a ſpirit of humanity and friendſhip ſhould animate all our proceedings.

While we conſider this, we can never be ſurprized, to find a perſon (however incapable of the taſk) attempting the defence of his country, and uſing his weak endeavours for the help of his fellow-ſubjects. Much leſs can we blame him, for contending for the priviledges of mankind, and oppoſing ſuch actions as are ſhocking to humanity.

What man is there, who is poſſeſſed of the leaſt ſpark of friendſhip; who has any

any ſenſe of the laws of God, of nature, and of his country, who would not endeavour to riſque his fellow-creature from the hands of a murderer, and bring the criminal to condign puniſhment? Surely there is no one in this land of liberty, ſo deſtitute of noble principles, ſo regardleſs of the rights of mankind.

And yet, how much more degenerate muſt he be, who ſees without tenderneſs, pity or compaſſion, his fellow-creature brutally put to death (under colour of juſtice) by a miſtaken conſtruction, or tyrannical exertion of the laws of his country?——ſuch a man, (if any ſuch there be) is deſerving of the ſevereſt puniſhments, and unworthy to be ranked among the human ſpecies.——He ſhould immediately endeavour to animate his fellow-ſubjects with a ſpirit of liberty; to make them ſenſible of the rights of human nature, and the breach or abuſe of the laws of their country: He ſhould urge them, to revenge the death of their innocent fellow-ſubject who fell a victim to lawleſs tyranny and oppreſſion; and then he will diſcharge the duty of a man, then may he be ſtiled a father of his country.

I have attempted in the following Lines to enquire into an abuſe practiſed upon our laws,—a manifeſt infringement on our glorious conſtitution. An abuſe by which many have loſt their lives, and which if not prevented, may cauſe the death of many more.

Life, of all other bleſſings, is moſt deſirable to the human race: and though ſurrounded with misfortunes, diſcontent and unhappineſs, we would ſtill be loath to ſtep into eternity.

A man on his ſick bed, ſupports himſelf under the pleaſing hopes of a recovery; he truſts in providence that he will reſtore him to his health and thereby to his happineſs:——He ſtill can behold his family, his friends, his countrymen; and though unable to enjoy the ſight with as much tranquillity as he could wiſh, he would yet chooſe to live even in the melancholy ſituation, rather than loſe ſuch objects for eternity.——He has to care for his family; his wife, his children, demand his attention: and the thoughts of leaving them behind him, the imagination of taking an eternal farewel of all that is dear and valuable to him, ſhocks his

ſoul!

ſoul! and put a finis to his contentment.

Was mankind never to depart this life, but only now and then have a fit of ſickneſs, his mind would have no dread, his heart could feel no fear, he would be unawed at the commands of providence; for,—what does he regard when his life is not at ſtake?

But as the great ſovereign of the univerſe, has enacted one great, one unalterable law, by which he has appointed, that mankind ſhould die: it is therefore the care of every one to prolong his life, as far as human endeavours can prevail, and the will of his almighty creator will admit.

For this end we apply to the ſkilful for relief in our diſorders, we uſe the beſt means we can deviſe for the recovery of our health, and if we gain the victory over our ſickneſs, our hearts leap for joy, and intimate to us the goodneſs of God.

It is then next to a paradox, how any of the human race can be ſo deſtitute of their common nature, as to cut ſhort their days by their own impropriety:—It is almoſt irreconcileable to think how man-

kind can be guilty of ſuch actions, as they know muſt not only bring them to a ſpeedy ruin, but alſo to an ignominious death.

However ſome there are, who have ſo little conſideration of the preſent or the future, that they hurry themſelves along with the blaſt of their paſſions, until they are overſet by their own wind, and drowned in their own wickedneſs.

But as life to a rational creature is of all things moſt wiſhed for, ſo the wiſdom of our laws wiſhes moſt to preſerve it. And in this our glorious conſtitution, the life of a ſubject has been held ſo ſacred, that the moſt ſolemn, careful, and impartial methods are to be uſed, in trying and convicting a criminal, where his life eſpecially, as well as his liberty or property, are in danger.

To obſerve in this place the proceedings in our courts of juſtice on the trial of a malefactor, would ſeem needleſs, ſince few can be ignorant of what they have daily in their view; and ſince it is the glorious ſpirit of our conſtitution, that our laws ſhould be public, for the information of all men.—But as I conceive it may be pertinent to what I have now in hand,

hand, I ſhall give a ſhort recital of it; chiefly to ſhew the ineſtimable priviledges of Britiſh ſubjects, and how dear the life of an individual is held in the eye of the law.

And firſt, when a body is found dead in any open or ſuſpicious place and manner, the Coroner is called upon to examine by what means the perſon ſo found came by his death; which he is to find either as accidental, wilful, or otherways, according as the matter ſhall appear.—— If the inqueſt is brought in wilful murder, the criminal is immediately ſought for and indicted for the ſame; upon which the grand jury, according to the nature of the caſe, are either to find or reject the bill of indictment; if it be found, the priſoner ſtands his trial by the petty jury of twelve men, who bring in their verdict guilty or not guilty, according to the evidence laid before them, which it is the buſineſs of the judge, in an impartial manner, to recite to them.——Thus the priſoner muſt ſtand condemned three ways, by inqueſt, indictment, and verdict. And on his trial he has an opportunity of objecting againſt ſuch of the petty jury who are impannelled, as he thinks are intereſted to his prejudice, to a certain number.——And thus has the delinquent all

poſſible

poſſible opportunities of fair plea for his life.——The mode of trial by jury, we are told by hiſtorians, was firſt introduced by William the conqueror; who very juſtly conſidering the modes of trial then uſed, by ordeal and camp-fight, as too cruel and unjuſt, reduced all cauſes to the judgment of twelve men, nearly of the ſame rank with the priſoner.

This mode of trial by jury is one of the great bulwarks of our liberty. If we are once deprived of this, we may then bid farewel to our long boaſted priviledges. It ever has been, and ever ſhould be, the endeavours of a Britiſh ſubject, to defend this right againſt the attacks of tyrants and ſycophants; againſt ſuch, as envy our happineſs and freedom. And the principles of our conſtitution are ſuch, that the ſtrongeſt foundations are laid, for ſupporting the liberty of the ſubject. In the many ſecurities by which our priviledges are handed down to us, we find the mode of tryal by jury preſerved inviolable; and ſecured to us by that great fountain, from whence our freedom flows, THE GREAT CHARTER of our liberties.——In this we find the right of a Britiſh ſubject to a trial by his peers *(i. e.* equals) and the law of the land: and this priviledge we ſhould ever defend, and endeavour to tranſmit

tranſmit down to poſterity. All trials, by any other means, are unconſtitutional, and are to be looked upon as attempts made againſt the vitals of our government.

It is in defence of this glorious priviledge, it is to revive the decaying ſpirit of our conſtitution, that I now take up the pen: it is to make known the glaring inſult committed on our liberties, when a ſubject ſhall be whipp'd to death, ſhot through the brain, or othewiſe cruelly murdered by ſentence of the horrible court, the court-martial.

To ſee a fellow-ſubject, who is a drudge in the ſervice of his country, who confines himſelf to ſix-pence per day, when a trade might make him an opulent citizen, who barely procures as much nouriſhment as will ſupport life, and who quits all other enjoyments for military ſervitude;—to ſee him, for a trifling fault in his apparel, his attendance, or his diſcipline, ſavagely tied to the ſtake, and undergoing the ſevere penalty of ONE THOUSAND LASHES, perhaps more, and perhaps dying under the ſtripes;—to ſee the caſe of the unfortunate *Blakeney* before our eyes;—with other acts, ſhocking to the human ear: to ſee theſe things, I ſay,

ſay, in a land which boaſts of glorious liberty, muſt move our hearts with pity, and inſpire us with juſt reſentment.

That regulations in the army, as well as all other ſtations in life, are neceſſary, cannot be denied; for, otherwiſe, confuſion and tumult muſt enſue. But, when we come to touch upon the life of a ſubject, when we are to determine concerning the great object of our concern, we muſt then conſider the caſe with all imaginable exactneſs, caution, and ſolemnity.

Some very learned and ingenious perſons have advanced a doctrine (which, becauſe contrary to the laws and cuſtoms of theſe kingdoms, may ſound ſtrange in the ears of ſome people) that the putting a man to death, for theft only, is contrary to the law of God, and is murder. But, however ſome may argue, I believe a little ſerious reflection may incline them to the ſame opinion And, if theft is not a ſufficient crime for ſo capital a puniſhment as death, certainly a ſoldier, who, by chance, happens to ſleep on his poſt, or, perhaps by the ſevere treatment he has met with, is forced to deſertion, is far leſs deſerving of being hurled into eternity.

But,

But, let the crime be ſuppoſed adequate to the puniſhment, yet, if the ſubject is to be condemned, let him have fair plea for his life, let him have the benefit of the law, and let him have a trial by jury. Any trial, otherwiſe than by jury, is repugnant to the noble ſpirit of our conſtitution: and much more ſo, a trial by court-martial, where the judges themſelves are ſometimes the accuſers.—The ſpirit of our conſtitution manifeſtly appears to be moſt for the freedom and happineſs of the ſubject: It is not for oppreſſion and cruelty, for partiality and ſavageneſs; it is not for murder and unneceſſary correction; it is not for any thing ſhocking or unnatural. In point of life, it breathes on us compaſſion and tenderneſs, gives us fair plea, and full room for defence, does not tie us down to the arbitrary will of tyrants, nor ſuffer us to be judged by our own accuſers: In ſhort, the ſpirit of our conſtitution is the ſpirit of truth, juſtice, and mercy, the ſpirit of benevolence and generoſity, juſtice and freedom; it is the encourager of virtue, and tender corrector of vice; it entreats rather than commands, it adviſes rather than inſiſts; it condemns not 'till it accuſes, and accuſes not, 'till it has reaſon to condemn.

—Such is the ſpirit of that conſtitution under which we live, and to which a court-martial is contradictory.

The cruelties practiſed by courts-martial are ſo great, and ſo frequent, that they are ſufficient to rouſe in us every ſpark of liberty and indignation; and much more ſo, when they are done under the maſk of juſtice.

Lord *Coke* tells us that, 'It is the worſt 'oppreſſion which is done by colour of 'juſtice:' And ſuch we ſhall find in the point now in queſtion, when we come to conſider the ſtate of our laws on this head. —And, firſt,—The foundation on which this court builds its authority of putting ſoldiers to death both in time of PEACE and war, is the late act of parliament for puniſhing mutiny and deſertion in the army. It will be neceſſary, therefore, to conſider this act itſelf, before we endeavour to prove its inſignificance: And here I ſhall ſhew where it ſaps its own authority.——Stat. 11. *Geo.* 3. It recites in the preamble, that, 'Whereas no man can be 'forejudged of life or limb, or ſubject, in 'TIME OF PEACE, to any kind of puniſh-'ment within this realm by martial law, 'or in any other manner than by judg-

'ment

'ment of his peers and the law of the 'land; yet, nevertheleſs, it being requi-'ſite, &c.'——Here the ſubjeſt is firſt informed of the great priviledge he has a right to claim, of being tried by his peers and the law of the land——A priviledge which he enjoys under the great law of *Magna Charta*. For here we are told, 'That no man can be ſubject in TIME OF 'PEACE to any kind of puniſhment with-'in this realm by martial law:' And yet, the cauſe why the act was made contrary to this great charter, and theſe ineſtimable priviledges, is nothing more, than becauſe 'it is requiſite,' for the better regulating the army, &c. a reaſon, which in the ſequel we ſhall find to be inſufficient: For, if it can be proved, that this practice of putting ſoldiers to death, by martial law, in TIME OF PEACE, is againſt *Magna Charta*, and many of our law-books; and, alſo, that no ſtatute whatſoever can take place of, or diſpenſe with *Magna Charta*; then, any authority derived from this act of parliament muſt be vague and ineffectual, and this practice totally unlawful.

But, before we enter on this enquiry, let us return to the preamble of the ſtatute, which likewiſe informs us, that,

'the keeping a ſtanding army in TIME OF 'PEACE, unleſs it be with conſent of par- 'liament, is againſt law;' where, let me obſerve, that the keeping a ſtanding army in theſe kingdoms, was formerly almoſt unknown, and looked upon as an invaſion on the liberties of the ſubject. For a ſtanding army is contrary to the ſpirit of our conſtitution, and has been often found of prejudice to the ſubject: Witneſs the example at *St. George's Fields*, not to mention any other; a ſufficient inſtance of the pernicious effects of a ſtanding army, and enough to give us a ſurfeit of military power.

I ſhall now conſider what our law-books inform us on this head, in order to clear the way for a conſideration of *Magna Charta*.

And, firſt, A court-martial is defined to be 'A court for puniſhing the offences 'of officers and ſoldiers, in TIME OF 'WAR: and, what is called the martial 'law, may not be uſed in TIME OF PEACE, 'when the king's courts are open for juſ- 'tice.'

Jacob's Law Dict.

Hawkins

Hawkins in his pleas of the crown makes it felony to put a man to death by martial law in TIME OF PEACE, and in lib. i. ch. 32. § 59. he ſays that 'if a court-'martial in TIME OF PEACE, put a man 'to death by martial law, the judges and 'officers are guilty of murder.'——And with him agrees *Hale*, in his pleas of the crown, p. 46.—Hence we find theſe ſeveral law-writers who agree in this opinion; and yet it muſt be matter of ſurprize, to find a thing ſo often practiſed, which (if we are to credit all theſe authors) appears to be againſt law.

But theſe are not the only foundations upon which the argument may be ſupported; we have likewiſe the authority of lord *Coke*, in 3d. Inſt. p. 52. in theſe words.—'If a lieutenant or other that 'hath commiſſion of martial authority, in 'TIME OF PEACE, hang or otherwiſe 'execute any man, by colour of marti-'al law; this is murder. For it is againſt '*Mag. Ch.* ch. 29. and is done by ſuch 'power and ſtrength, as the party can-'not defend himſelf, and here the law 'implieth malice.'——Thus we find it contrary to *Magna Charta*; a law confirmed in the moſt ſolemn manner, and which

which cannot at any time, or by any means, be annulled or diſpenſed with.—This great charter of our liberties, has been ſealed with the blood of our anceſtors, and ſhould ever be defended by that of their poſterity. It is called by Spelman, ‘ *Auguſtiſſimum anglicarum libertatum di-* ‘ *ploma & ſacra anchora.*’——Nay, we even find curſes pronounced in the moſt ſolemn manner, againſt the violaters of it.——Thus we find that king Henry III. after he had ſeveral times made breaches in this charter (which has ever been diſagreeable to tyrannical ſovereigns) and as often ſwore to obſerve it; came in the thirty-ſeventh year of his reign to Weſtminſter-Hall, and in the preſence of the nobility and biſhops, with lighted candles in their hands, *Magna Charta* was read: the king all that while laying his hand on his breaſt, and at laſt ſolemnly ſwearing, faithfully and inviolably, to obſerve all the things contained therein, as he was a man, a chriſtian, a ſoldier, and a king. Then the biſhops extinguiſhed the candles, ſaying, ‘ thus let him be extinguiſh-‘ ed and ſtink in hell, who violates this ‘ charter.’ So ſacred was it ever held in the eyes of Britains; and we find four noteable cauſes mentioned in the beginning

ning of it, *viz.* firſt, for the honour of God; ſecond, the health of the king's ſoul; third, the exaltation of holy church, and fourthly, the amendment of the kingdom.——But this charter is further confirmed by acts of parliament, thus we find one, 43d *Edward* III. by which all ſtatutes, &c. made againſt *Magna Charta*, are declared void.——

So far I have troubled the reader with eſtabliſhing the credit of *Magna Charta*, becauſe I have before ſhewn this practiſe to be directly contradictory to it, according to the opinion of a renowned juſticiary.——I ſhall now ſhew an example, for the further illuſtration of the point in queſtion. The ſame lord *Coke* in his 3d Inſt. before mentioned, lays down a caſe as follows.——'*Thomas* earl of Lancaſter 'being taken in an open inſurrection, was 'by judgment of martial law, put to 'death; this was adjudged unlawful:— '*Eo quod non fuit arrainiatus ſeu ad reſ-* '*ponſionem poſitus* TEMPORE PACIS.—— '*Eo quod cancellariæ et aliæ curiæ regis* '*fuerunt tunc apertæ, ni quibus lex fiebat* '*unicuique prout fieri conſuevit, quod* 'CONTRA CHARTAM DE LIBERTATI-'BUS, *cum dictis Tho. fuit unus pa-* '*rium & magnatum regni non impri-ſonetur.*

'*ſonetur, &c. nec dictus rex ſuper eum*
'*ibit nec ſuper eum mittet niſi per legale*
'*judicium parium ſuorum, &c.*——*tamen*
'TEMPORE PACIS *abſque arrainiamento*
'*ſeu reſponſione ſeu legali judicium pari-*
'*um ſuorum, &c.*'

'*adjudged murder.*'

We are alſo told by a certain hiſtorian, that at the time of the rebellion in this kingdom, certain members of the houſe of commons in England drew up twenty-one queries for the opinion of the judges, one of which enquired, 'whether the 'ſubjects of theſe kingdoms are ſubject 'to martial law; and whether any man 'in TIME OF PEACE can be thereby ſen-'tenced to death; and if not, what pu-'niſhment do they incur, who in TIME OF 'PEACE execute martial law?'——And the opinion of the judges was 'that no 'ſubject of theſe kingdoms, ought to be 'ſentenced to death, or executed by mar-'tial law in TIME OF PEACE: and if any 'ſubject be ſo ſentenced, or executed by 'martial law, the authors and actors of 'any ſuch ſentence or execution, are 'puniſhable by the law of the land for 'their ſo doing, as doers of their own 'wrong, and contrary to the ſaid law of 'the land.'——

After

After all theſe authorities from the moſt approved authors, can it be any longer doubted, that our liberties are moſt ſeverely ſtruck at, every time that our fellow-ſubject thus illegally falls a prey to military cruelty.——Cruel it is, that he ſhould ſuffer death for a crime which is by no means adequate to the puniſhment; but far more cruel muſt it be, when he ſuffers contrary to law, and for want of a knowledge of his right, or of friends or money to riſque him from deſtruction. Oh! deplorable ſituation.—— can we any longer forbear to call aloud for redreſs? can we be negligent of the ineſtimable liberties of Britiſh ſubjects? ſurely no;——ſuch a caſe as this demands our attention; and if we find a right, we ſhould ever ſtrive to ſupport it.

I make no doubt but many who are friends to miniſterial craft, to lawleſs tyranny, to military ſervitude;—Degenerate ſouls, who are unworthy of enjoying thoſe priviledges which were handed down to us at the expence of the blood of our anceſtors may wonder at ſo uncommon a doctrine, and endeavour to confute my arguments. But let the free-born ſubject, carefully conſider the caſe; let him enquire, whether the paſſages here quoted

 are

are true, whether they may be depended on as fact:——If they may,——then let him endeavour the ſupport of his liberties, the happineſs and welfare of his country.

He, that would attempt to ſhew an error in theſe arguments, muſt firſt ſhew an error in all the law-writers whom I have before quoted; he muſt prove the law to be contrary to what they lay down, and that the putting a man to death, by ſentence of a court-martial in TIME OF PEACE, is not contrary to *Magna Charta*, and that Lord *Coke*'s opinion, and the opinion of the judges before-mentioned are wrong: Or, otherwiſe, allowing them to be right, he muſt prove *Magna Charta* to be nothing elſe than a bubble, and that it is in the power of an act of parliament to make void, or diſpenſe with it.

But ſuch a thing as this ſeems to me totally impracticable: For it would be ſtrange to find ſo many ſages in the law, both antient and modern, advancing and ſupporting a doctrine, without any foundation whatſoever.

I muſt confeſs myſelf extremely happy, if I could contribute in any manner to the well-

well-being of my country, or the relief of my fellow-ſubject. And, I believe, there is no perſon of the leaſt humanity, who would not wiſh to ſee a ſtop put to many of thoſe military cruelties, which are daily preſented to our view.——If what I have advanced hitherto, is ſufficiently ſtrong to ſupport my argument in the opinion of any ſenſible and diſintereſted perſon, I ſhall then have my reward; and if the publiſhing of theſe lines ſhould tend to the preſervation of the life of even but one of my fellow-ſubjects, I ſhall then be more than ten-fold recompenſed for my labour.——Whatever errors may have eſcaped my pen, the reader is requeſted with good nature to overlook:——And, upon a real confutation of my arguments, I ſhall willingly give up the point. But, 'till then, I ſhall bid defiance to the malicious, and the partial; who may be at enmity with this Work, as well as with their country.

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